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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No.**

KAWASAKI MOTORS CORPORATION,

*Petitioner,*

*vs.*

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Petitioner Kawasaki Motors Corporation (hereinafter Kawasaki) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in summarily dismissing a direct appeal pursuant to Section 307(b)(1) of the Clean Air Act (42 U.S.C. § 1857 *et seq.*) of an administrative order by the Administrator of the Environmental Protection Agency (hereinafter Administrator and EPA, respectively).

## I.

## THE OPINION BELOW.

The unreported opinion of the Court of Appeals is reprinted and appended hereto as Appendix E.

## II.

## JURISDICTION.

The Court of Appeals entered its judgment and order of dismissal on August 9, 1974. No rehearing or extension of time in which to file this petition was granted or requested. This petition is timely filed pursuamt to 28 U.S.C. Section 2101(c). This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

## III.

## QUESTIONS PRESENTED FOR REVIEW.

May § 307(b)(1) of the Clean Air Act, providing for Appellate review of an EPA order on grounds arising more than 30 days therefrom, be nullified by failure of the reviewing court to consider sworn proof of such jurisdictional facts?

In a petition for review of that portion of the California Implementation Plan banning operation of motorcycles unless certain predetermined exhaust emission standards are subsequently enacted by EPA, may the Court of Appeals dismiss for lack of jurisdiction in the face of sworn proof that achievement of such standards is technologically impossible, and that such facts could not have become known within the 30-day appeal period?

## IV.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitution of the United States:

> "No person shall . . . be deprived of . . . property, without due process of law . . ."
>
> Constitution of the United States, Fifth Amendment

The Clean Air Act (42 U. S. C. § 1857 *et seq.*):

> "A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day."
>
> Section 307(b)(1) (42 U.S.C. § 1857h-5(b))

## V.

## STATEMENT OF THE CASE.

The following facts are uncontested because Kawasaki's petition for review was dismissed by the Court of Appeals on the Administrator's motion after Kawasaki had filed sworn affidavits supporting the invocation of Section 307(b)(1) of the Act, but before the Administrator had an opportunity to file a reply.

On November 12, 1973 the Administrator promulgated an Order pursuant to Section 110(b)(3) of the Clean Air Act known as the California Transportation Control Plan (38 FR 31321). The Plan imposed a total ban on the operation of all motorcycles in the principal air quality regions of the State of California during daylight hours during the months of May, June, July, August and September, effective January 1, 1976. However, the ban would be suspended if the Administrator established "legally valid and binding emission standards applicable to all motorcycles" on a nationwide basis provided that such nationwide standards achieve a minimum emission reduction of 50% by the 1976 model year, and equal the standards applicable to automobiles for the 1979 model year and all years thereafter.[1]

---

1. Administrative proceedings leading to promulgation of the Plan began on January 22, 1973 when the Administrator published

Although numerous other aspects of the Plan were appealed by interested parties prior to the expiration of the 30-day period for such appeals, the motorcycle ban was not then challenged by Kawasaki or any other party.

Formal notice announcing the setting of such nationwide motorcycle emission standards was not published by the Administrator until January 17, 1974 in an Advance Notice of Proposed Rule Making (39 FR 2108). This Notice proposed for the first time a technical basis (including baseline emission assumptions and standard test procedures) for achievement of the specified emission reductions set forth in the November 12, 1973 Plan as a condition for suspension of the motorcycle ban. A deadline of March 18, 1974 was set for comment.

Acting in response to the Advance Notice, Kawasaki secured the cooperation of its Japanese parent company, whose engineers hand carried the technical data and conclusions relating to the economic and technological possibility of achieving such emission levels to the United States on March 11 or 12, 1974. Kawasaki's affidavits (Appendix D, Exhibits A and B) establish that this is the earliest date on which it knew or reasonably could have known of the impossibility of achieving the proposed reductions in motorcycle exhaust emissions upon which the Administrator had conditioned lifting the California motorcycle ban. The technical report from Kawasaki's Japanese parent company was edited, retyped and hand carried to the EPA's Ann Arbor, Michigan office in time to meet the March 18, 1974 deadline.

Kawasaki's petition for review of the California Transportation Control Plan (Appendix A) was promptly prepared and

a Notice of Proposed Rule Making (38 FR 2195). No motorcycle ban was then proposed or suggested. Proposed regulations were published July 2, 1973 (38 FR 17683) and July 16, 1973 (38 FR 18948), in which a ban was proposed only for certain motorcycles having two-stroke engines, with no suggestion that achievement of specific emission limitations might be imposed as a condition for lifting the ban.

filed on April 19, 1974. The Administrator on June 17, 1974 filed a motion to dismiss (Appendix B) and supporting memorandum (Appendix C) alleging that the 30 day limitation of the Statute was jurisdictional. Kawasaki filed its brief and supporting affidavits in opposition to the Administrator's motion to dismiss on July 26, 1974 (Appendix D).

The Court of Appeals granted the motion to dismiss on August 9, 1974 (Appendix E), with the Administrator having filed no reply memorandum.

## VI.

## REASONS WHY THE WRIT SHOULD BE GRANTED.

### A. The Availability of Relief Under § 307(b)(1) of the Act Is an Important Question of Federal Law Which Must Be Settled by This Court.

The "subsequently arising grounds" exception to the statutory appeal period is unique among administrative statutes providing for direct review by the Courts of Appeals.[2] There are no reported opinions providing guidance for its interpretation and application.

The legislative history of the Clean Air Act plainly demonstrates that Congress anticipated that in the highly technical area of public health and environmental quality, research and experience might subsequently demonstrate that the technical mandate of a prescribed implementation plan which had become

2. While numerous statutes provide for direct review of administrative orders to a Circuit Court of Appeals, only the Clean Air Act and the Water Pollution Control Act have such a saving provision. Under the latter, an appeal must be made within ninety days unless based solely on grounds arising "after such ninetieth day." 33 U.S.C. § 1369. Other administrative statutes not having such a provision for relief include 47 U.S.C. § 402 (Federal Communications Commission), 7 U.S.C. § 193 (Department of Agriculture), 42 U.S.C. § 2239 (Atomic Energy Commission), 49 U.S.C. § 1486 (Federal Aviation Administration), and 29 U.S.C. § 660 (Occupational Safety and Health Administration). This list of statutes allowing such direct review is not exhaustive.

final might well be impossible to achieve, or might itself present a greater danger to public health than the problem which it had been intended to abate.[3]

For this simple and obvious reason Congress provided the right to any person to challenge the standards, regulations and implementation plans of the Administrator whenever it is alleged that significant new information has become available.[4] This point is made crystal clear by the following excerpt from Senate Report No. 91-1196, Sept. 17, 1970:

> "The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information may dictate a revision or modification of any promulgated standard or regulation established under the Act. *The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promul-*

3. By way of example, the 1972 amendments to the Clean Air Act required the Administrator to adopt regulations which would achieve a 90% reduction in automotive emissions by 1976. The Administrator did so. 40 CFR § 85.076-1. It soon became clear that the only way to comply with 1975 and later regulations was to use exhaust catalysts or reactors and Detroit has adopted such systems for virtually all of its 1975 and later production. Thereafter the Administrator realized the catalytic pollution controls might create an air quality problem of their own and comments on this subject were solicited from the public on March 8, 1974 (39 FR 9229). Shortly thereafter the Environmental Protection Agency itself sent to the Federal Energy Office a research report by an independent organization stating that the use of automotive catalysts, when considered with other energy-saving factors, *could actually threaten public health* by increasing atmospheric sulfate concentrations to dangerous levels. 5 Env. Rep. 14 (May 3, 1974).

4. The Administrator's efforts to abate air pollution now threaten to be swept aside by the energy crisis. While the Administrator is on the one hand trying to ban the operation of gasoline-saving motorcycles in California, on the other he is exhorting the Detroit auto manufacturers to achieve a 40% mileage improvement by 1980. "Auto Men Hear U.S. Plea On 40% Gas Mileage Rise", New York Times, October 30, 1974.

*gated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.*" (Emphasis supplied.)

The Administrator's motion argued, and the Court of Appeals found, that the 30-day limitation period of the Act is "jurisdictional". Such was never intended by Congress, as is amply demonstrated by the foregoing quote.

The Court of Appeals has ignored both the language of the Statute and the directive of Congress, which constitutes an important question of Federal law which has not been, but should be settled by this Court.

**B. By a One-Sentence Summary Dismissal, the Court of Appeals Has Ignored an Undisputed Allegation of Jurisdictional Facts, Which Is Such a Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for This Court to Grant Certiorari.**

Kawasaki's Petition for Review (Appendix A) was expressly based on the "subsequently arising grounds" provision of the Clean Air Act. Upon the filing of the Administrator's motion to dismiss, Kawasaki produced sworn evidence that the technological basis for the appeal was not discovered and indeed could not have been discovered within 30 days following the promulgation of the November 12, 1973 California Transportation Control Plan. The Administrator has never filed counter-affidavits or in any way responded to Kawasaki's allegations, because the briefing schedule was interrupted by the act of the Court of Appeals in entering judgment dismissing Kawasaki's petition for review. No findings were filed with that judgment.[5]

5. The reluctance of the Court of Appeals to undertake the factual determination of jurisdictional questions is perhaps understandable, in view of the remarks in the concurring opinion of Circuit Judges Clark and Boyle in *State of Texas* v. *Environmental Protection Agency*, 499 F.2d 289, 321-22, 6 ERC 1897, 1919

The Federal Administrative Procedure Act, 5 U.S.C. § 557 *et seq.*, requires that a record disclosing the basis of administrative decisions must be made. The necessity of such a record is that unless it is made, the courts cannot conduct a meaningful, intelligent review of administrative action. *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80 (1943); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941).

The same considerations which require an administrative body to specify its reasons for decision are embodied in Federal Rule of Civil Procedure 52 which requires that a court enter findings of fact and conclusions of law in sufficient detail so as to reveal the basis of its decision. The correct finding of facts is fully as important as the application of correct legal rules to the facts as found. *United States* v. *Forness*, 125 F.2d 928, cert. den. 316 U.S. 694 (2nd Cir. 1942). Findings of fact must be made in sufficient detail and exactness to indicate to a reviewing court the factual basis for the ultimate conclusion reached. *S. S. Silberblatt, Inc.* v. *United States ex rel. Lambert Co.*, 353 F.2d 545 (5th Cir. 1965); *Commercial Standard Air Co.* v. *Liberty Plan Co.*, 283 F.2d 893 (10th Cir. 1960).

It must be borne in mind that the Appellate Court is the initial reviewing court in this situation; normally, the District Court is the initial reviewing court for administrative matters. Since the District Court is required by Rule 52 to enter findings when reviewing administrative matters, then by analogy the Appellate Court should be required to do likewise in those cases where it occupies the position of the initial reviewing court.

Although the text of Rule 52 recites that findings are unnecessary on motions, except as provided in Rule 41(b), the latter rule provides that whenever a court renders a judgment on the merits against the plaintiff, the Court shall make findings as required by Rule 52. This rule also provides that a dismissal (ex-

(5th Cir. 1974)) where they highlight the "adverse effects flowing from the legislative mandate that judicial review proceedings be injected into the court system at the appellate level".

cept for certain named exclusions) operates as an adjudication on the merits.

Obviously, a determination of a fact question is necessarily involved in the decision of the Appellate Court (by statute the original reviewing court). Petitioner has alleged that its petition is based upon grounds arising after the 30th day after the rule in question was adopted, as provided in the statute. The Court has seemingly determined that the grounds did not arise after the 30th day without affording any opportunity for hearing and without entering the required findings of fact.

In the administrative procedures leading up to the promulgation of the Administrator's final order, the Administrator dropped his proposal for an outright ban on *some* motorcycles, and substituted a conditional ban on *all* motorcycles, to be hinged upon the achievement of a complex array of technological milestones. The injustice of changing theories in mid-stream without reasonable notice to the parties affected is well recognized. *Rodale Press, Inc.* v. *Federal Trade Commission*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968). In dismissing Kawasaki's petition for review without stating any findings of fact or conclusions of law, and apparently without considering Kawasaki's sworn and uncontroverted allegations of grounds arising subsequent to the 30 day appeal period, the Appellate Court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision by writ of certiorari.

## VII.

## CONCLUSION.

Kawasaki's petition for review of the California motorcycle ban was dismissed for lack of jurisdiction because the Court of Appeals either (1) ignored the plain language of § 307(b)(1) of the Clean Air Act, or (2) disregarded Kawasaki's sworn

and uncontradicted proof of facts supporting such jurisdiction. Substantial questions of public importance are presented for the future application of federal environmental law.

The granting of a writ of certiorari is respectfully solicited.

Respectfully submitted,

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# APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL TRAIN, Administrator of the ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

## PETITION FOR REVIEW.

Kawasaki Motors Corporation hereby petitions this Court pursuant to Section 307(b)(1) of the Clean Air Act (42 U.S.C. 1857 et seq.) for review of the action of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency in approving and promulgating the implementation plan entitled California Transportation Control Plan, including without limitation the approval and promulgation of amendments to Subpart F, Part 52 of Chapter I, Title 40 of the Code of Federal Regulations, Section 52.243 which was published in the Federal Register, Volume 38, No. 217, on November 12, 1973.

This petition is based solely on grounds arising after the 30th day from the date of the foregoing approval and promulgation, namely, the determination that the emission standards required therein for new motorcycles sold in 1976 and later model years, and manufactured and sold in 1979 and later model years, are

technically impossible to achieve, and the imposition of such Plan will work an arbitrary and unreasonable hardship upon Petitioner with no corresponding public benefit, and will deprive Petitioner of its property without due process of law.

Dated: April 18, 1974.

McCUTCHEN, DOYLE, BROWN & ENERSEN,
JOHN N. HAUSER,
JAMES L. HUNT,
By /s/ JAMES L. HUNT,
*Attorneys for Petitioner*
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## APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

No. 74-1697

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL E. TRAIN AND ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

### MOTION TO DISMISS.

Respondents, Russell E. Train and the Environmental Protection Agency, move this Court, pursuant to Rule 27 of the Appellate Rules of Civil Procedure, to dismiss the petition to review on the ground that this Court *lacks jurisdiction* under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. sec. 1857h-5(b)(1) to review the regulation *since the petition was filed out of time.*

Respectfully submitted,

MICHAEL D. GRAVES,
*Attorney,*
Department of Justice,
Washington, D.C. 20530.

## APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

No. 74-1697

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL E. TRAIN AND ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

### Statement

Kawasaki Motors Corporation, pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. sec. 1857h-5(b)(1), filed with this Court on *April 18, 1974*, a petition to review the motorcycle limitation regulation contained in the California Transportation Control Plan promulgated by the Administrator of the Environmental Protection Agency on *November 12, 1973*, 40 C.F.S. sec. 52.243.[1]

1. This regulation bans the operation of motorcycles in specified air quality regions in the state of California between the hours of 6:00 a.m. and 6:00 p.m. during May through September. This ban, which is scheduled to go into effect on January 1, 1976, will be suspended until January 1, 1975, and possibly thereafter, if but only if the Administrator establises "legally valid and binding" emission standards applicable to all new 1976 and later model year motocycles.

The Petition to Review Was Filed Out of Time.

Section 110(c) of the Clean Air Act, 42 U.S.C. sec. 1857c-5(c), requires the Administrator to promulgate implementation plans for a state under certain circumstances. Pursuant to that authority, the Administrator on November 12, 1973, promulgated the California Transportation Control Plan which, *inter alia*, regulates emissions from motorcycles.

Section 307(b)(1) of the Act provides that any person may seek review of the promulgation of an implementation plan in the United States Court of Appeals for the judicial district in which such person resides or transacts business. The statute, however, very specifically limits the time within which a person may seek judicial review; the time limit is thirty days after the date of promulgation.[2] It would be difficult to imagine a statutory deadline which is more explicit than the one involved here.

Courts of Appeals, including this Court, have consistently dismissed petitions to review which were filed beyond the strict statutory deadlines established in the Clean Air Act. In *Sears, Roebuck and Company* v. *Environmental Protection Agency*, No. 74-1002 (C.A. 9, 1974), this Court dismissed a petition to review filed one day after the statutory deadline. A copy of the order dismissing the petition is attached as Appendix A. Accord, *Darrah* v. *Environmental Protection Agency*, No. 72-2926 (C.A. 9, 1972) (petition filed eighteen days late); *National Association of Industrial Parks* v. *Environmental Protection Agency*, No. 74-1013 (C.A. 3, 1974) (petition filed fifteen days late) *Dore Wrecking Company* v. *Environmental Protection*

2. Section 307(b)(1) of the Clean Air Act in part provides:

A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition should be filed fithin 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

*Agency*, No. 73-1686 (C.A.D.C. 1973) (petition filed forty-two days late). Copies of the orders in *Darrah*, *N.A.I.P.* and *Dore* are enclosed as Appendices B, C, and D, respectively.

Moreover, in situations where parties attempted to *intervene* in existing actions after the statutory time limit for filing petitions to review, the courts have refused to accept jurisdiction over the prospective intervenors. *Duquesne Light Company* v. *Environmental Protection Agency*, 481 F.2d 1, 10 (C.A. 3, 1973); *Sears, Roebuck and Company* v. *Environmental Protection Agency*, No. 73-2095 (C.A. 3, 1974); *Fitz-Inn Auto Parts Inc.* v. *Environmental Protection Agency*, No. 73-1386 (C.A. 1, 1974). Copies of the orders in *Sears* and *Fitz-Inn* are enclosed as appendices E and F, respectively.

It is clear that petitioner, which alleges that the regulation will cause it economic hardship, has belatedly recognized the implications to itself of the regulation (Kawasaki Petition at 2). However, that recognition does not confer jurisdiction upon this Court. Petitioner, for reasons best known to itself, elected to ignore Section 307(b)(1) and filed its petition to review one hundred fifty-seven days after promulgation of the regulation. In apparent recognition of this fatal infirmity petitioner attempts to effect the *only cure in the Act*[3] by stating that its

> petition is based solely on grounds arising after the 30th day from the date of . . . promulgation, namely, the determination that the emission standards required therein for new motorcycles sold in 1976 and later model years, are technically impossible to achieve . . . . [Kawasaki Petition at 2.]

The regulation does not require emission standards for new motorcycles. It merely provides that if emission standards are promulgated by EPA, the ban on motorcycle operation does not apply. If emission standards are not established, the absolute

3. A petition to review may be filed later than the thirtieth day after promulgation only if it is based upon grounds arising after such thirtieth day. Section 307(b)(1).

ban on motorcycles operation continues in effect. Emission standards for new motorcycles have not yet been issued.[4] Therefore, insofar as the petition seeks review of the ban on motorcycle use, the petition was filed out of time. If petitioner seeks review of the emission standards for new motorcycles, the petition was filed prematurely and in the wrong court.[5] In either case, the petition must be dismissed.

Conclusion.

For the foregoing reasons, this Court should dismiss the petition to review.

Respectfully submitted,

MICHAEL D. GRAVES,
*Attorney*,
Department of Justice,
Washington, D.C. 20530.

4. The Administrator believes, however, that "significant reductions in the emissions from new motorcycles can be achieved." 38 Fed. Reg. 31236 (November 12, 1973). Acting on that belief, he called for public comment on proposed emission standards. 39 Fed. Reg. 2108 (January 17, 1974).

5. Section 307(b)(1) of the Clean Air Act requires any petition to review an emission standard to be filed in the Court of Appeals for the District of Columbia Circuit.

## APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL TRAIN, Administrator of the ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

No. 74-1697

### PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS.

Petitioner Kawasaki Motors Corporation (Kawasaki) hereby presents its brief in opposition to the motion of the Respondents (hereinafter referred to as "the Administrator") to dismiss Kawasaki's Petition For Review of the California Transportation Control Plan promulgated on November 12, 1973.

*The Factual Background.*

Kawasaki's sole basis for this appeal rests on grounds arising more than 30 days after the promulgation of the Administrator's order complained of. Specifically, the grounds constitute the economic impracticality and technological impossibility of achieving certain specified reductions in the exhaust emissions from production motorcycles, which appeared for the first time in the Administrator's final order in the Federal Register of November 12, 1973.

Under that order, if the Administrator's specified exhaust emission levels are not subsequently ordered by the Environmental Protection Agency (EPA) at the national level by "legally valid and binding emission standards" the State of California *must prohibit the operation of all motorcycles* in each air quality region during daylight hours for six months out of every year, commencing January 1, 1976 (38 F.R. 31264).

Thus the Administrator has effectively predetermined the outcome of presently pending federal rulemaking on exhaust emissions from new motorcycles. Rulemaking proceedings on this subject were only initiated in an Advance Notice published January 17, 1974 (39 F.R. 2108) and for which even draft regulations have not yet been promulgated.* Yet if EPA's final standards do not meet the Administrator's predetermined minimum requirements as set forth in the November 12, 1973 California Transportation Control Plan, motorcycle operation will be effectively banned in California six months out of every year, to the obvious economic detriment of Kawasaki and the motorcycle industry in general.

No hint of this result appeared in any of the Administrator's promulgations leading to the November 12, 1973 order. (See generally, affidavit of Roger Hagie attached hereto as Exhibit A).

In the Administrator's final order of November 12, 1973, there appeared *for the first time* the condition that if certain specified nationally applicable motorcycle emission standards were not enacted (and for which no rulemaking procedures had yet been initiated) then the motorcycle ban would be imposed.**

* Informal conversations between Kawasaki's counsel and Rod Jenkins, assistant to Eric Stork of the EPA's Office of Mobile Emission Sources, suggests that such draft regulations will not appear before early 1975.

** Not surprisingly, an Advance Notice of Proposed Rulemaking appearing January 17, 1974 proposes exactly those predetermined emission standards.

Even though Kawasaki kept abreast of the Administrator's pronouncements and even participated in hearings on the California Transportation Control Plan in July, 1973 (Hagie affidavit, Exhibit A) the promulgation of the Administrator's final order on November 12, 1973 came as a complete surprise. Kawasaki had no suggestion that this result was forthcoming and no basis on which to determine whether the Administrator's preconceived emission standards were either economically feasible or technologically possible. It was only when the Advance Notice of Proposed Rulemaking appeared on January 17, 1974 that Kawasaki had any concrete basis with which to consult the engineers of the Research and Development Department of its parent company in Japan, Kawasaki Heavy Industries, Ltd. (See affidavit of I. Tamura, attached as Exhibit B).

When Kawasaki received the hand-carried technical report of the Japanese engineers Otsuki and Takemoto on or about March 12, 1974, Kawasaki first realized that such levels could not in all likelihood be achieved within the time frame permitted by the Administrator, and that the California motorcycle ban would thus be unavoidable (Tamura affidavit, Exhibit B).

*The Administrator's Position.*

In his Memorandum in Support of Motion to Dismiss, the Administrator has not only mis-cited both the facts and the governing statute, but has gratuitously thrown in dismissal orders from seven other cases, six of which are unreported and *none* of which have any bearing whatever on the issue presented here, namely, Kawasaki's statutory right to petition for review based solely on grounds arising after the thirtieth day from the date of the Administrator's order.

Contrary to the Administrator's position on page 2 of his brief, Section 307(b)(1) of the Clean Air Act expressly *allows* the filing of a petition more than 30 days after the promulga-

tion of the order complained of "if such petition is based solely on grounds arising after such thirtieth day". Such grounds are alleged in Kawasaki's petition in precisely the same words.

The Administrator further asserts the following:

> "The regulation does not require emission standards for new motorcycles. It merely provides that if emission standards are promulgated by EPA, the ban on motorcycle operation does not apply."
>
> (Administrator's brief, pages 4-5)

Apparently the Administrator has forgotten the terms of his own order. The ban is not to be lifted "merely" if the EPA adopts any nationally applicable motorcycle emission standards. To avoid the ban, the Administrator requires *in advance* that such standards represent "at least a 50% reduction in present emission levels" of certain pollutants in 1976, and "at least the same degree of emission control" as is required for automobiles in 1979 (38 F.R. 31246, November 12, 1973).

If the Administrator had not attempted to short-circuit the administrative rulemaking process (which he subsequently and belatedly began on January 17, 1974), Kawasaki would have no dispute. Instead, he has said in effect: "You may have your hearings and other rulemaking procedures, but if the outcome is not as I have ordered it to be on November 12, 1973, the California motorcycle ban will take effect".

As clearly pointed out in the preceding section and the Hagie affidavit (Exhibit A) Kawasaki and the rest of the motorcycle industry were given no hint of the Administrator's intention to determine in advance the outcome of the now-pending motorcycle emission rulemaking proceedings. The specific emission levels sought to be enacted by the Administrator did not see the light of day until they appeared in the Administrator's final order on November 12, 1973. Neither Kawasaki nor anyone else in the industry had any opportunity to evaluate the economic feasibility or technological possibility of meeting the levels on

the dates required. Only by investigations started subsequent to that time could they hope to determine whether any grounds for appeal existed (see Tamura affidavit, Exhibit B).

The injustice of such a position is obvious. As stated in the leading case of *Rodale Press, Inc.* v. *Federal Trade Commission*, 407 F.2d 1252 (D.C. Cir. 1968):

> "Hence it is well settled that an agency may not change theories in mid-stream without giving respondents reasonable notice of the change. By substituting an issue . . . for the one framed by the pleading, . . . the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute [Section 5 of the Administrative Procedure Act] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied." (Citations omitted, emphasis in original.)
>
> 407 F.2d at 1256-57.

The Administrator finally argues that "Courts of Appeals, including this Court, have consistently dismissed petitions to review which were filed beyond the strict statutory deadlines established in the Clean Air Act", citing a total of seven cases. Three of the cases involve attempts to intervene rather than an appeal as of right which is the situation here. The remaining four cases do *not* involve the present issue of subsequently arising grounds for appeal. (See the affidavit of John E. Burns, attached as Exhibit C.)

If the Administrator will review his own files, he must admit that he has no case law whatever in support of the present motion.

*The Basis of This Appeal.*

The Administrator cannot deny that the preconceived national motorcycle emission standards appearing in the November 12, 1973 order were never proposed or suggested until the order appeared in the Federal Register. Only on January 17, 1974

were these predetermined regulations clarified and expanded in the form of an Advance Notice of Proposed Rulemaking. It was *only* at this point that Kawasaki and the motorcycle industry in general were given sufficient information with which to study and evaluate the economic feasibility and technological possibility of complying with these new standards.

The technical report containing the results of this study and evaluation was hand-carried from Japan to Kawasaki's Santa Ana, California headquarters about March 11, 1974. (Tamura affidavit, Exhibit B.) After analysis by Kawasaki's California technical staff and legal counsel, the impossibility of achieving the Administrator's predetermined requirements became apparent, thereby presenting for the first time the grounds for this appeal.

Kawasaki's petition was promptly prepared and filed by mailing April 18, 1974. Subsequently, Kawasaki learned that its competitors Suzuki and Yamaha had independently reached the same conclusion on the impossibility of complying with the Administrator's predetermined emission levels. (Hagie affidavit, Exhibit A.)

*Kawasaki's Position is Meritorious,*
*and Unless This Appeal is Allowed to Proceed,*
*The California Motorcycle Ban*
*Will Entirely Escape Appellate Review.*

Counsel is informed by the Administrator's attorneys that more than 200 separate appeals have been filed contesting various aspects of the California Transportation Control Plan, but that Kawasaki is the only party seeking to obtain review of the Administrator's predetermined emission standards and contingent ban on motorcycle operation in California.

The Administrator is plainly seeking to read the "subsequently arising grounds" clause out of the Clean Air Act. This clause is unique among administrative statutes allowing direct appeal

to Courts of Appeals. Through exhaustive research counsel could find no other example of such a curative clause, and thus no case law concerning it. The legislative history, however, is clear:

> "The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the Act. The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, *or approved or promulgated implementation plan* after the date of promulgation *whenever it is alleged the significant new information has become available.*"
>
> Senate Report No. 91-1196,
>
> September 17, 1970.

The Administrator further argues that the limitation period is "jurisdictional". While an appeal from a final decision of a lower court is jurisdictional, such an appeal from the decision of an administrative agency is one of limitation, and is measured by a considerably less stringent standard in order to protect the interests of the parties. *Diva Laboratorium Aktiengeselischaft* v. *DeLoney & Company*, 237 F. Supp. 868, 870 (D.D.C. 1965).

### *No Delay or Hardship Will Result by Granting This Petition for Appellate Review.*

As previously pointed out, the Administrator is already faced with more than 200 other timely petitions for review, testing virtually all aspects of the California Implementation Plan except the one for which Kawasaki seeks review in this proceeding. We understand that the Record has not yet been filed, and in

any event can easily be supplemented to include the relatively short hearings pertaining to this issue. Briefs are not due until September.

The orderly progress of this case will not be impeded, and a point of substantial public interest will be preserved, if Kawasaki's Petition For Review is allowed in this case.

*Conclusion.*

The Administrator, as pointed out above, has turned one administrative rulemaking process into a vehicle for creating and enforcing a predetermined result in a subsequent rulemaking proceeding. He has done so without presenting the crucial issue, that of specific numerical motorcycle emission standards, to the public for intelligent participation and comment prior to the promulgation of his November 12, 1973 order.

The appellate review provision of the Clean Air Act is unique in allowing judicial review after the expiration of the usual 30-day period where, in the words of the Senate Report, "it is alleged that significant new information has become available". In the present case there has been such an allegation, both in the Petition for Review and in the affidavits herein (see Tamura affidavit, Exhibit B). Kawasaki could not possibly have been in a position to evaluate and comment on the emission standards announced in final form by the Administrator on November 12, 1973 within 30 days after such announcement. The reasons are twofold. First, because the Administrator gave no hint or suggestion prior to the date of announcement that such standards were to be imposed. Second, because it took Kawasaki more than 30 days, even when working at top speed, to obtain from its research and development engineers in Japan the necessary information to respond to the pending rulemaking process which was commenced by the Administrator on January 17, 1974 (Tamura affidavit, Exhibit B).

If this petition is dismissed, the Administrator's obviously improper procedure will go unchallenged—a bitter precedent indeed when the Clean Air Act expressly provides for relief in such cases.

Respectfully submitted,

JAMES L. HUNT,
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EXHIBIT A.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL TRAIN, Administrator of the ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

No. 74-1697

## AFFIDAVIT OF ROGER HAGIE.

ROGER HAGIE, being sworn, deposes and says that:

1. I am employed by Petitioner Kawasaki Motors Corporation as legislative coordinator at Kawasaki's principal office in Santa Ana, California. As one of my responsibilities I am charged with keeping abreast of legislation and rulemaking proceedings by state and federal agencies in connection with motorcycle exhaust emissions.

2. In connecton with the ban on motorcycle operations promulgated by the Administator on November 12, 1973, Kawasaki Motors Corporation first became aware of an announcement in the Federal Register of January 22, 1973 stating that the Administrator intended to propose implementation plans for certain regions in California as a result of an order of the United States District Court for the Central District of California. This announcement was styled a "notice of proposed rulemaking" and contained no proposed regulation pertaining to motorcycle registration or operation. The only mention of any motorcycle controls whatever was in the preamble which

suggested that the number of vehicle miles traveled might be reduced by "limiting the number of automobiles and motorcycles registered. . . ." (38 F.R. 2195).

3. The next announcement by the Administrator on this subject appeared in the Federal Register of July 2, 1973 where specific regulations were proposed under the heading "Motorcycle Limitation Program". This proposal required the State of California to prohibit the operation of 2-stroke motorcycles (equipped with 2-stroke engines rather than the more common 4-stroke type) in daylight hours during six months of the year in the Los Angeles region, and prohibiting the State from registering in 1974 more motorcycles than the total registration in 1973. No suggestion was made that any such controls might be contingent upon emission rulemaking at the national level, or on predetermined emission limits to be set in the future.

4. On July 16, 1973 the Administrator promulgated proposed rules in the Federal Register pertaining to other air quality regions in the State of California, containing the same motorcycle control proposals as in the July 2, 1973 proposal pertaining to the Los Angeles region. Again, no suggestion was made of making the control program contingent upon the enactment of predetermined motorcycle emission limits at the national level.

5. In response to the Administrator's proposed rulemaking, hearings were held in July, 1973 in which comments were solicited from major motorcycle manufacturers on the possibility of significant emission reductions. On cross-examination by the Administrator's representative there were certain questions directed to the witnesses which assumed the possibility of certain specified emission level reductions. Witnesses for Kawasaki and two major competitors (Yamaha and Suzuki) were thus induced to speculate on whether a 50% short-term reduction could be achieved on certain exhaust constituents, and a 90% reduction in the long term. A Kawasaki witness (who was not represented by counsel) was also induced to speculate

that a 90% reduction from some base figure (not specified) was "possible" although there would be "some pretty severe problems . . . which could take some considerable lead time." (Record, page 216).

6. The first suggestion of a total motorcycle ban for California air regions (as opposed to a ban on 2-strokes only) occurred in the Administrator's final rulemaking appearing in the Federal Register for November 12, 1973. This document also announced for the first time the Administrator's program to condition the lifting of the motorcycle ban on the adoption of predetermined motorcycle emission standards achieving at least a 50% reduction of specified exhaust constituents by the 1976 model year, and achieving emission levels equal to automobiles by the 1979 model years. The Administrator purports to base this result on the testimony of motorcycle manufacturers (38 F.R. 31236).

7. The first suggestion of the baseline from which the proposed emission reductions would be measured occurred in the Advance Notice of Proposed Rulemaking appearing in the Federal Register on January 17, 1974. No specific regulations were proposed, but comments were instead invited on several aspects of control technology. The proposal suggested certain rough emission limits with no statement of the sampling or measurement techniques which would significantly affect numerical results.

8. The Advance Notice called for comments to the EPA office in Ann Arbor, Michigan no later than March 18, 1974. Acting in response to this request Kawasaki Motors Corporation secured the cooperation of its parent company in Japan, Kawasaki Heavy Industries, Ltd., and Kawasaki's response was hand carried to the United States by engineers of the parent company, arriving here about March 11 or 12, 1974. This is the earliest date on which Kawasaki knew of the facts and conclusions which were thereafter hand carried to the EPA to meet the March 18, 1974 deadline.

9. Similar facts and conclusions were contained in the submissions by Kawasaki's competitors Suzuki and Yamaha. Suzuki's comments were first received by us on May 10, 1974, Yamaha's comments, which had to be obtained from the EPA's public records office in Washington, D. C., were not received until June 6, 1974. Both of these competitors reached the same conclusion reached by Kasawaki Heavy Industries, Ltd., namely, that the proposed 50% reductions by 1976 and automotive level limits by 1979 were technologically and practically impossible to achieve by those dates.

10. As a consequence of becoming aware of the technological and practical impossibility of meeting the Administrator's predetermined requirement for the lifting of the motorcycle ban in California, Kawasaki Motors Corporation promptly moved to prepare and file its petition to review in this Court, which petition was served by mailing April 18, 1974.

.....

ROGER HAGIE

Subscribed and Sworn to before me this ..... day of ..... ....., 1974.

.....

*Notary Public*

EXHIBIT B.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL TRAIN, Administrator of the ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

No. 74-1697

## AFFIDAVIT OF I. TAMURA.

I. TAMURA, being sworn, deposes and says that:

1. I am Director of Engineering for Kawasaki Motors Corporation, the Petitioner in this cause. As part of my duties, I coordinate the exchange of technical information between Kawasaki Motors Corporation and its parent company in Japan, Kawasaki Heavy Industries, Ltd.

2. In response to the Advance Notice of Proposed Rulemaking brought to my attention by Kawasaki's legislative coordinator Roger Hagie subsequent to its publication on January 17, 1974, I caused the engineering department at Kawasaki Heavy Industries, Ltd. located in Akashi, Japan, to investigate the practicality and technical possibility of achieving certain specified reductions in motorcycle emissions as set forth in the Advance Notice.

3. In response to our request the Kawasaki Heavy Industries, Ltd. First Engineering Department under the direction of Mr. Otsuki undertook a program of research and evaluation

of the Advance Notice and proposed standards. This work was done by Mr. Kato, Manager of the Emissions Research and Development Department, and his Assistant Manager Mr. Takemoto.

4. On or about March 12, 1974 Mr. Otsuki and Mr. Takemoto arrived in the offices of Kawasaki Motors Corporation in Santa Ana, California, hand-carrying the document which, after editing and revision, became Kawasaki's response to the Advance Notice, filed with the EPA's laboratory in Ann Arbor, Michigan on March 18, 1974.

5. As stated in Kawasaki's response to the Advance Notice:

> "Kawasaki must respectfully dissent from the apparent comments of certain major manufacturers of 2-stroke motorcycles in connection with the promulgation of Transportation Control Plans. We seriously doubt the ability of any 2-stroke engine manufacturer to achieve a 50% average reduction in exhaust emissions with existing technology. Our own efforts have achieved this level of success with only one model, a large-displacement engine having very poor emission characteristics, and that only in carefully controlled laboratory conditions." (Submission, page 2)

6. As a consequence of this information, and the realization that the proposed reduction by the Administrator in the implementation plan promulgated November 12, 1973 was impossible to achieve as a matter of technological fact, Kawasaki caused to be mailed a petition to review that plan. This petition was mailed April 18, 1974 only 30 days from the due date of the Advance Notice comments. (Subsequent to that mailing we have reviewed the submissions of our competitors Suzuki and Yamaha, and determined that they are in accord with our conclusion, in spite of what the Administrator believes they had represented at hearings in 1973.)

7. For the foregoing reasons it is the position of Kawasaki Motors Corporation that the technological impossibility of meet-

ing the Administrator's predetermined emission regulations, on which the lifting of the California motorcycle ban is contingent, did not arise until more than 30 days after the promulgation of the California Implementation Plan on November 12, 1973.

.....

I. TAMURA

Subscribed and Sworn to before me this ..... day of ....., 1974.

.....

*Notary Public*

EXHIBIT C.

UNITED STATES COURT OF APPEALS

For the Ninth Circuit.

KAWASAKI MOTORS CORPORATION
*Petitioner,*

*vs.*

RUSSELL TRAIN, Administrator of the ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

No. 74-1697

## AFFIDAVIT OF JOHN E. BURNS.

JOHN E. BURNS, being sworn, deposes and says that:

1. I am associated with the firm of Price, Cushman, Keck, Mahin & Cate of Chicago, Illinois, attorneys for Petitioner Kawasaki Motors Corporation in this cause.

2. On July 1, 1974 I undertook to check the citations of authority in the Respondents' Motion to Dismiss mailed to this Court June 17, 1974. In particular, I investigated the four cases cited in the Respondents' brief at page 3 which purportedly hold that "Courts of Appeals, including this Court, have consistently dismissed petitions to review which were filed beyond the strict statutory deadlines established in the Clean Air Act."

3. While the Respondents attached copies of the bare orders of dismissal in each of the foregoing cases, no suggestion appears of any facts or allegations raising the issue of grounds arising after the thirtieth day from the date of promulgation of the Administrator's implementation plan, as provided under Section 307(b)(1) of the Act. Since the decisions are unreported, the facts surrounding such issues, if any, could not be found through legal research.

4. I therefore was compelled to contact the attorney representing the Petitioner in each of the cited cases by first calling the Clerk of Court, obtaining access to the docket file, and thereby obtaining the name of each respective attorney. In doing so I learned the following:

5. In *Sears, Roebuck & Company* v. *Environmental Protection Agency*, No. 74-1002 (9th Cir. 1974) Mr. Philippe J. Monet of Alhambra, California, represented the Petitioners and informed me that the issue of subsequently arising grounds was neither briefed nor argued.

6. In *Darrah* v. *Environmental Protection Agency*, No. 72-2926 (9th Cir. 1972) Mr. Darrah was contacted in Hawaii and informed us that the issue of subsequently arising grounds of appeal was never presented, with the Petitioner choosing not to resist the Administrator's motion to dismiss.

7. In *National Association of Industrial Parks* v. *Environmental Protection Agency*, No. 74-1013 (3d Cir. 1974) the Petitioner's attorney Peter Sudler was contacted in Newark, New Jersey, and he informed us that the issue of subsequently arising grounds was never raised, and that the appeal was dismissed by consent.

8. In *Dore Wrecking Company* v. *Environmental Protection Agency*, No. 73-1686 (D.C. Cir. 1973) I contacted Mr. William I. Harkaway in Washington, D.C., attorney for Petitioners. and was informed that the basis for appeal was lack of notice, and that the issue of grounds arising after the thirtieth day was only added later in a single paragraph at the end of a 10-page reply brief, and not fully presented and argued on the merits.

/s/ JOHN E. BURNS,
John E. Burns.

Subscribed and Sworn to before me this 12 day of July, 1974.

/s/ THERESE POTTER,
*Notary Public.*

## APPENDIX E.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

KAWASAKI MOTORS CORPORATION,
*Petitioner,*

*vs.*

RUSSELL TRAIN, Administrator of the ENVIRONMENTAL PROTECTION AGENCY; ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

No. 74-1697

### ORDER.

Before: CHOY and SNEED, *Circuit Judges.*

The appeal herein is dismissed for lack of jurisdiction. 42 U.S.C. § 1857h-5(b).

/s/ HERBERT J. C. CHOY,
/s/ JOSEPH L. SNEED,
*U.S. Circuit Judges.*